

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

Inquiry Concerning High-Speed Access  
to the Internet Over Cable and Other  
Facilities

GN Docket No. 00-185

Internet Over Cable Declaratory Ruling

Appropriate Regulatory Treatment for  
Broadband Access to the Internet Over  
Cable Facilities

CS Docket No. 02-52

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA  
AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

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## I. INTRODUCTION

The People of the State of California and the California Public Utilities Commission (“California”) respectfully submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”), released March 15, 2002, by the Federal Communications Commission (“FCC”) in the above-captioned proceedings. In its NPRM, the FCC seeks further comment regarding the appropriate regulatory framework that should govern the provision of cable modem service. In its companion Declaratory Ruling, the FCC has classified cable modem service as an interstate information service under the Telecommunications Act of 1996 (“1996 Act” or “Act”).<sup>1</sup>

Previously, on September 28, 2000, the FCC issued a Notice of Inquiry (“NOI”) in which it sought comment on the appropriate legal and policy framework to govern cable modem service. California actively participated in that proceeding, and urged the FCC to classify cable modem service as partly a common carrier telecommunications service, and to adopt an open access regime to enable end users using cable modem service a choice of ISPs.

In this NPRM, the FCC acknowledges the extensive record developed in the NOI on the FCC’s “authority to regulate cable modem service, as well as the costs and benefits of imposing a multiple ISP requirement on cable operators.” NPRM, ¶

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<sup>1</sup> The FCC’s Declaratory Ruling is currently the subject of review in Brand X Internet Services, et. al. v. FCC, Case No. 02-70518 et.al., U.S. Court of Appeals for the Ninth Circuit. *(Continuation on next page)*

72. The FCC, however, seeks additional comment on these issues in light of its initiation of the Wireline Broadband NPRM, in which the FCC asks for comment on the legal and regulatory implications of its proposal to reclassify broadband service using wireline facilities as an interstate information service.<sup>2</sup> In particular, the FCC seeks comment on whether it is “necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly.” NPRM, ¶ 72. The FCC further states that to the extent that the transport component of cable modem service is subject to common carrier regulation, the FCC seeks comment on its proposal to forbear from applying such regulation. Id., ¶ 95. Among other things, the FCC tentatively concludes that enforcement of Title II common carrier provisions is not necessary for the protection of consumers or to ensure just, reasonable and nondiscriminatory terms and conditions of service. Id. and ¶ 108. In addition, the FCC seeks comment on whether it should preempt any specific state or local regulation of cable modem service. Id., ¶ 99.

For the same reasons set forth in California’s comments on the FCC’s NOI, California urges the FCC to adopt an open access regime for cable modem service.

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California is a petitioner in this appeal.

<sup>2</sup> California filed comments in the FCC’s Wireline Broadband NPRM, urging the FCC to maintain its classification of DSL and other broadband services using wireline facilities as a telecommunications service, and to maintain the Computer II regulatory framework and other requirements of the 1996 Act for these services.

California further urges the FCC not to forbear from regulating the transport component of cable modem service as common carriage under Title II of the Act. The adoption of an open access regime and the regulation of cable modem transport under Title II are essential to meet the core policies of the 1996 Act – enhanced consumer choice of services at lower prices, and the offering of services on just, reasonable, and nondiscriminatory terms.<sup>3</sup>

## **II. DISCUSSION**

In Computer II, the FCC recognized that basic transport services underlying the provision of information services were bottleneck services that the FCC could, and should, regulate to ensure that incumbent local exchange carriers fairly and reasonably competed in offering their own unregulated information services. The FCC thus required that these facilities-based carriers unbundle and offer the transmission component of information services under tariff, and acquire such transmission service for their own information services under tariff. These requirements have been extended to the incumbent carrier's provision of DSL service.

Cable operators offering cable modem service, either directly or through affiliated ISPs, are facilities-based carriers. Nationally, thirty-eight percent of residential customers who reside in areas where broadband service is available have

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<sup>3</sup> A copy of California's comments on the NOI are attached hereto.

access solely to cable modem service.<sup>4</sup> While DSL service offered by the incumbent telephone companies is the predominant method of broadband access to the Internet for the majority of residential customers in California, there are several areas where millions of California residents have access to the Internet solely via cable modem service. These areas include mid-sized cities like Fresno, California. In such areas, to the extent that DSL service is also provided, the physical plants do not generally overlap. As a result, these residential customers do not have a choice between cable modem service and DSL service. Nor do other viable broadband transmission service alternatives exist.<sup>5</sup>

In these circumstances, the FCC should require, pursuant to Computer II, that cable operators unbundle and offer on nondiscriminatory and reasonable terms the transport component of cable modem service to end users or unaffiliated ISPs.<sup>6</sup>

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<sup>4</sup> JP Morgan/McKinsey & Co., *Broadband 2001*, April 2, 2001, Chart 25.

<sup>5</sup> Broadband transmission service via fixed wireless and satellite technologies is not widely deployed and is available only on a limited basis in certain areas in California. In addition, rates charged for broadband service via satellite are significantly higher than for DSL and cable modem services. *The Status of Telecommunications Competition in California*, June 5, 2002 (Prepared by the California Public Utilities Commission).

<sup>6</sup> In AT&T Corp. v. City of Portland, 216 F.3d 871 (9<sup>th</sup> Cir. 2000), the Ninth Circuit correctly classified the transport component of cable modem service as a common carrier transmission service under Title II. California questions how the FCC could regulate cable modem service under its ancillary jurisdiction under Title I if the FCC believes that cable modem service is entirely an information service. NPRM, ¶78. In California v. FCC, 905 F.2d 1217, 1240 n.35, the Ninth Circuit made clear that Title I does not contain a specific grant of jurisdiction to the FCC. The FCC's Title I authority over cable modem service must be ancillary to the exercise of specific statutory responsibilities contained in another title of the Act. *Id.* Other than citing general goals in the Act, the FCC has not identified any specific responsibilities to which its assertion of authority over cable modem service would be ancillary.

As discussed in California's comments in the NOI, there is no reason to expect the facilities-based cable modem service provider to interconnect with unaffiliated ISPs and provide nondiscriminatory access to its transport services over cable facilities without regulatory intervention. Nothing has significantly changed to alter that expectation. Cable modem service providers still do not enable customers to purchase transmission capability separately, and, except pursuant to mandated merger agreements, cable providers still do not offer unaffiliated ISPs nondiscriminatory access to last-mile cable transport facilities. The Computer II requirements applicable to facilities-based providers of essential transmission capability is therefore critical to further the consumer and competition policies underlying the Act. Forbearance at this stage would not be appropriate. Unless and until vigorous competition among facilities-based broadband service providers becomes a reality such that consumers enjoy a wide variety of service choices at lower prices, it is premature to forbear from regulating cable modem transport service.

To be sure, customers who have no viable broadband transmission options other than cable modem service may be harmed in additional ways if the FCC forbears from regulating the transport component of this service as common carriage. As voice and other services migrate to cable broadband technology, these customers will have no guarantee that the price that the cable operator charges for connectivity to the Internet will be just and reasonable. They will have no

guarantee that the cable operator will comply with reasonable termination and billing practices, or conform to specified service quality standards. If the customer is disabled, he will have no assurance that the cable operator will provide him with affordable and reasonable access to the cable network to place his calls. Low-income customers and customers residing in high-cost areas will likewise have no assurance of affordable access to the cable network. Congress intended to maintain basic consumer protections and enhance consumer's choices when providers of information services own or control the essential transmission facilities upon which these services are provided. Forbearance is thus inconsistent with congressional intent.

California further urges the FCC not to preempt state authority over intrastate services offered via cable modem facilities. California is aware of no state laws or regulations that have impeded the development of cable modem service.

### **III. CONCLUSION**

For the reasons discussed here and in California's comments on the FCC's NOI, California respectfully urges the FCC to adopt an open access regime for cable modem service and to regulate the transport component of cable modem service under Title II. These measures are essential to secure, through competition,

enhanced consumer choices of high quality services at lower prices, as Congress intended under the 1996 Act.

Respectfully submitted,

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# **ATTACHMENT**

